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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the matter of	)	
	)	
Joint Application by SBC Communications	)	
Inc., Southwestern Bell Telephone Company,	)	
and Southwestern Bell Communications	)	CC Docket No. 01-194
Services, Inc. d/b/a Southwestern Bell Long	)	
Distance for Provision of In-Region InterLATA	)	
Services in Arkansas and Missouri	)	

COMMENTS OF SPRINT COMMUNICATIONS COMPANY L.P. ON SOUTHWESTERN BELL'S SECTION 271 APPLICATION

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036
(202) 328-8000

Attorneys for Sprint
Communications Company L.P.

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WASHINGTON, D.C.

In the matter of Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region InterLATA Services in Arkansas and Missouri	))))))))	CC Docket No. 01-194

COMMENTS OF SPRINT COMMUNICATIONS COMPANY L.P. ON SOUTHWESTERN BELL'S SECTION 271 APPLICATION

Sprint Communications Company L.P. ("Sprint") opposes the above-captioned application of Southwestern Bell ("SWBT") for authorization to provide in-region, interLATA services in Arkansas and Missouri.[1] The application fails to meet the requisite standards of Section 271 and cannot be granted at this time.

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[1] See Joint Application by SBC Communications Inc., Southwestern Bell Telephone Co., and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Arkansas and Missouri, CC Dkt. No. 01-194 (filed Aug. 20, 2001) ("SWBT Br."). Unless otherwise indicated, all materials cited in these comments are contained in the record entitled Application of SWBT for Authorization to Provide In-Region, InterLATA Services Pursuant to Section 271 of the Telecommunications Act of 1996 and for the Approval of the Arkansas Interconnection Agreement, Dkt. No. 00-211-U, before the Arkansas Public Service Commission ("Arkansas PSC") and the record entitled Application of SWBT to Provide Notice of Intent to File an Application for Authorization to Provide In-Region, InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act of 1996, Case No. TO-99-227, before the Missouri Public Service Commission ("Missouri PSC"). Where possible, citation to the appropriate record appendix and tab is provided.

I. INTRODUCTION AND SUMMARY

The 1996 Telecommunications Act's policy of stimulating local competitive entry is threatening to fail. Industry participants have been forced to slow or reverse course. Facilities-based competitive entrants are experiencing financial difficulties on a widespread basis. Both large and small CLECs have been unable to raise additional capital needed to expand. Some have gone bankrupt; others have merely retreated from earlier business plans. In this context, SBC's portrayal of widespread competition in the states of Arkansas and Missouri is simply surreal.

Sprint's comments on Arkansas focus primarily on the lack of facilities-based competition in that state, coupled with the limitations placed on the authority of the Arkansas PSC to ensure current and continued compliance with Sections 271-272. As discussed below, the Arkansas PSC is prohibited under state law from regulating the terms upon which SWBT must offer interconnection, access to unbundled network elements ("UNEs"), and resold services. The fox, SWBT, is guarding the henhouse. Nor can these issues be viewed (or dismissed) in isolation. The fact that the state commission cannot act to prescribe TELRIC-based UNE prices or impose penalties under state law is no doubt a significant cause of the paucity of local competition in that state.

Other issues arise in Missouri. There, the unlawful rates that control -- rates that are so unreasonable and so riddled with uncertainty that they cannot rationally be said to permit efficient entry -- require rejection of SWBT's application.

If the Section 271 process is to have *any* positive bearing on the development of local competition, the Commission must hold the line here.

II. SWBT Fails In Arkansas To Meet Track A's Requirement That A CLEC Offer Facilities-Based Residential Service In Competition With SWBT.

SWBT has not met the requirements of Track A in Arkansas. There are no facilities-based carriers offering an "actual commercial alternative" to SWBT for residential customers. Moreover, the reason for this circumstance is clear: far from being merely "the whims of individual CLECs" (SWBT Br. at 11), the source of the problem is SWBT's own failure to offer interconnection and UNEs on commercially reasonable terms. Under these circumstances, SWBT's application must fail.

SWBT makes three arguments to avoid this consequence. First, it argues that ALLTEL and Navigator qualify as "competing providers" of facilities-based residential services notwithstanding the undisputed fact that both carriers have withdrawn from this market. Second, it argues that there are three other carriers offering such service, notwithstanding record evidence and the Arkansas PSC finding to the contrary. Third, SWBT says resale should suffice. SWBT is wrong on all counts.

A. Arkansas Residential Consumers Have No Competing Facilities-Based Alternatives Available To Them.

Neither ALLTEL nor Navigator currently competes with SWBT for residential customers. This has been the case for the better part of a year.[2] While SWBT tries to contort this fundamental failure of the record by arguing that Section 271 does not contain a "marketing"

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[2] In the case of ALLTEL, it ceased taking on new residential customers in November 2000. See Consultation Report at 11 (ARPSC Dec. 21, 2000) (App. C - AR, Tab 78) ("First Consultation Report"). In the case of Navigator, it ceased in February 2001. Hearing Transcript at 50 (Apr. 20, 2001) (App. C – AR, Tab 82) ("Tr."). (The electronic transcript is not paginated. The page numbers cited herein reflect the page as printed from the electronic version. As a result, Sprint's citations do not necessarily match those provided by the Arkansas PSC in its Second Consultation Report, which apparently intersperses pagination of items referenced during the hearing.)

requirement, the plain fact is that neither of these companies is competing with SWBT for residential customers on a facilities basis. As the Arkansas PSC ruled in December 2000, whatever number of residential customers might currently be served by these carriers, "through attrition those numbers will steadily decline."[3]

Congress mandated that "there must be an actual commercial alternative to the BOC in order to satisfy Section 271(c)(1)(A)."[4] The Commission has explicitly recognized that "there may be situations where a new entrant may have a commercial presence that is so small that the new entrant cannot be said to be an actual commercial alternative to the BOC, and therefore, not a 'competing provider.'"[5] Here, the "commercial presence" of ALLTEL and Navigator with respect to facilities-based residential services is not merely "small," it simply does not exist.

In its Louisiana II Order, the Commission ruled that a service provider of telephone exchange service must offer services that actually compete with the service of the BOC in order to qualify as a "competing provider" under the terms of Section 271(c)(1)(A).[6] If consumers

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3 First Consultation Report at 5.

4 Application by SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Oklahoma, 12 FCC Rcd 8685, ¶ 14 (1997) (citation omitted) ("Oklahoma Order"), aff'd, SBC Communications, Inc. v. FCC, 138 F.3d 410, 416 (D.C. Cir. 1998) (affirming Commission's interpretation of "competing provider" as requiring "an actual commercial alternative" and expressing "doubt that appellant's interpretation, even if adopted by the Commission, would be thought reasonable"); see also Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan, 12 FCC Rcd 20543, ¶ 76 (1997) (citation omitted) ("Michigan Order"). Even without Track A's express requirement, the public interest would require denial of a Section 271 application where no actual competitive alternatives existed in the state.

5 Michigan Order ¶ 77.

6 See Application of BellSouth Corp. for Provision of In-Region, InterLATA Services in Louisiana, 13 FCC Rcd 20599, ¶ 31 (1998) ("Louisiana II Order") (competing providers must offer "'an actual commercial alternative to the BOC'") (citations omitted).

cannot or do not actually substitute their monopoly provider's service with those offered by another provider, then there is no competing service as required by the statute. Certainly if the expanding commercial mobile wireless services could not be shown on the Louisiana II record to be competing services, then the terminated offerings of ALLTEL and Navigator – which by definition no longer exist except as narrowly grandfathered – cannot be deemed to be in any sense "competing."[7]

SWBT relies upon three other carriers, WorldCom, Logix and McLeod, as a fallback. See SWBT Br. at 13. First, notwithstanding a remarkable persistence by SWBT in naming WorldCom as alternative provider, WorldCom has denied absolutely that it ever has served residential customers in Arkansas.[8] The 69 customers that SWBT points to as being served by the remaining carriers constitute less than one-hundredth of one percent of the customers served by SWBT in Arkansas and have been characterized by the Arkansas PSC staff as truly *de minimis*. See Tr. at 244. Even this grand total of 69 cannot be credited, since it is in part based on SWBT's "methodologies," which produced the very same types of errors that led SWBT to conclude that WorldCom is providing residential service when in fact it is not.[9]

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7 Moreover, as of April 2001, over one-third of ALLTEL's customers were ALLTEL employees. The Commission has previously questioned the relevancy of employee customers for purposes of establishing Brooks Fiber as a competing provider under Track A especially where, as here, Brooks Fiber was not "accepting requests for residential service." Oklahoma Order ¶¶ 17-18. Based on the fact that SBC had not presented evidence that Brooks was accepting requests for residential service, the Commission concluded that SBC had not even made a "threshold showing that Brooks is a competing provider that satisfies section 271(c)(1)(A)." Id. ¶ 18.

8 Second Consultation Report at 4 (ARPSC May 21, 2001) (App. C - AR, Tab 86) ("Second Consultation Report").

9 Similar errors were documented in the Louisiana II Order wherein BellSouth had claimed, on the basis of E911 listings and ported numbers, that KMC had residential customers when it did not in fact serve any. Louisiana II Order ¶ 47. In the Kansas/Oklahoma proceeding, SWBT used

B. Resale Services Do Not Meet The Requirements Of Track A.

SWBT next argues that Track A can be met even if residential customers have only resale alternatives available to them, with no facilities-based options other than SWBT. But the requirement for "facilities-based" competition in Section 271(c)(1)(A) applies independently to both classes of customers identified in the statute -- business and residential -- as a matter of law. Notwithstanding SWBT's mischaracterization of the law (SWBT Br. at 13), the Commission has not ruled on this legal issue previously. See Louisiana II Order ¶ 48 (while suggesting that there may be policy considerations that would counsel against adhering to the literal terms of the statute, "that is not the case presented by this application. Thus, we do not conclude whether BellSouth has satisfied the requirements of Track A…."); see also Michigan Order ¶ 85 n.190 ("we need not and do not reach the question of whether it is sufficient under section 271(c)(1)(A) for a competing provider to provide local service to residential subscribers via resale…."). In the

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its "methodologies" to conclude erroneously that Global Crossing was providing residential service in Kansas and to inflate Sprint's residential customers in that state. Compare Global Crossing Comments at 1-2 (FCC Nov. 15, 2000), with SWBT Brief at 15 (Oct. 26, 2000), filed in Joint Application by SBC for Provision of In-region, InterLATA Services in Kansas and Oklahoma, CC Dkt. 00-217; see Sprint Comments at 6, 8 (FCC Nov. 15, 2000), filed in Joint Application by SBC for Provision of In-region, InterLATA Services in Kansas and Oklahoma, CC Dkt. 00-217. The disconnect between the number of E911 listings and the number of lines served by a carrier, as illustrated by the Smith Affidavit, further undermines the reliability of SWBT's methodology and its estimates. See J. Gary Smith Affidavit, Attachment E at 1-3 (App. A – AR, Tab 21) ("Smith Aff.") (compare number of E911 listings and MOU exchanged with UNE-P and resold lines reported for Logix, McLeod, and Navigator). SWBT's use of trunk-to-line ratios above one has also been discredited by the Department of Justice. See DOJ Evaluation at 9 n.15 (FCC Feb. 14, 2000), filed in Application by SBC Communications, Inc. to Provide In-region, InterLATA Services in Texas, CC Dkt. No. 00-65 (highlighting evidence that SWBT's methodology overstated at least one CLEC's lines by 190%). The mythology behind these methods needs to be recognized and rejected by the Commission.

Kansas/Oklahoma Order, the Commission found the presence of facilities-based competitors and thus did not need to rule definitively on this issue either.[10]

Regardless of dicta in prior decisions, Section 271(c)(1)(A) is unambiguous on this point. In order to qualify as a Track A competing provider, there must be some CLEC serving a majority of its residential customers with its "own facilities." As a legal matter, Section 271 exhibits Congress' explicit preference for facilities-based entry.[11] The subsection specifically sets forth both classes of customers as the intended beneficiaries of facilities-based local competition. The first sentence of subsection 271(c)(1)(A) requires that the BOC show that it is "providing access and interconnection ... [to] unaffiliated competing providers of telephone exchange service to residential and business subscribers." 47 U.S.C. § 271(c)(1)(A). The second sentence mandates that "such telephone exchange service" -- *i.e.*, the services that the "competing providers" are extending to both residential and business subscribers -- must be offered either "exclusively over their own" facilities, or "predominantly over their own" facilities "in combination with resale." Id. The explicit reference in the second sentence to "such telephone exchange service" (especially set out as service distinct from "resale") makes clear that the service provided to each class of customers must be provided over the competitor's own facilities.[12]

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[10] Joint Application by SBC for Provision of In-Region, InterLATA Services in Kansas and Oklahoma, 16 FCC Rcd 6237, ¶ 41 (2001) ("Kansas/Oklahoma Order") (finding that Birch and Ionex provide service to residential users exclusively through their own facilities), appeal filed, Sprint Communications Co. L.P. v. FCC, Case No. 01-1076 (D.C. Cir. Feb. 16, 2001).

[11] See Oklahoma Order ¶¶ 41-43.

[12] Indeed, had Congress been indifferent to whether residential customers were served by competitive facilities the subsection could have been and no doubt would have been written very differently. In fact, there would have been no need to even address residential services in a subsection labeled "presence of a *facilities-based* competitor."

This reading also flows as a matter of policy. Both business and residential customers should be able to enjoy the benefits from the 1996 Act in the form of facilities-based competition. The legislative history confirms this. The Conference Report discusses at length the "meaningful facilities-based competition" made possible by the fact that "cable services are available to more than 95 percent of United States homes."[13] As the Conference Report concludes, "[s]ome of the initial forays of cable companies into the field of local telephony therefore hold the promise of providing the sort of local residential competition that has consistently been contemplated."[14]

To argue otherwise is to assert that Congress wanted business customers to have a real competitive choice but did not care enough to insist on meaningful alternatives for residential consumers. Given that the very essence of Section 271 is to ensure independent, facilities-based commercial alternatives, this reading would undercut the very intent of the provision. Also, because the Commission has permitted the lease of UNEs to constitute competitive facilities under this Section, any further diminution in the Section's requirements would relegate most residential customers to the limited benefits of resold "competition" only. It also would reward BOCs for impeding the availability of UNEs, as SWBT has done here.

The Commission has suggested that if all other preconditions were met, a grant might be appropriate, even in the absence of facilities-based residential competition. But it is highly unlikely that this would ever be the case. The requirements of Track A and the requirements of the checklist are hardly independent, isolated factors. If there are no facilities-based providers, there must be some inquiry into why there are none. One powerful inference is that checklist

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13 H.R. Conf. Rep. No. 104-458, at 148 (1996) (emphasis added), reprinted in 1996 U.S.C.C.A.N. 124, 160.

14 Id. (emphasis added).

compliance is defective in some significant way, impeding competitive entry. Here, there is substantial *direct* evidence that the very reason why carriers such as ALLTEL and Navigator have withdrawn from facilities-based competition is due to the strategic behavior of SWBT itself. ALLTEL explained to the Arkansas PSC that it had to discontinue its residential service "due to high cost and due to poor performance." Tr. at 15. ALLTEL described SWBT's provisioning performance as "so service affecting, so customer perception affecting, so cost driving" that it is "relevant especially" to Section 271 consideration. Id. at 19. ALLTEL's experience with SWBT's provisioning led it to conclude that unless SWBT is made to fix these problems now, "[t]here just won't be residential competition." Id.

Navigator similarly explained that its initial foray into UNE-P based service "has turned out to be a costly mistake." Id. at 47. It explained that the paper promises of SWBT in its interconnection agreement (the very agreement that SWBT now relies on so heavily) bore no relationship to what actually occurred. "In reality, Southwestern Bell's interpretation and implementation of the agreement has raised continuing significant operational roadblocks." Id. at 48. Pointing to such problems as hidden charges and erroneous billing, Navigator explained it was forced to switch exclusively to resale-based services for new residential customers. Id. at 48-49.

Fundamentally, the legislative purpose of requiring actual facilities-based competition was to ensure that the BOC had in fact opened its markets and made entry feasible.[15] The failure of facilities-based entry for residential competition here not only prompts the inference that SWBT has failed to undertake the requisite steps to open its markets, there is direct proof of this fact. It

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[15] See H.R. Rep. No. 104-204, at 77 (1996), reprinted in 1996 U.S.C.C.A.N. 10, 43; H.R. Conf. Rep. No. 104-458, at 148 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 160; see also Louisiana II Order ¶¶ 46-47.

would make a mockery of Congress' mandate to this agency for the Commission to close its eyes to this misconduct.

Even assuming *arguendo* that resale were sufficient under the statute, SWBT would have to show that these residential consumers, in combination with business customers, were being served by a carrier "predominantly" using its own facilities. See 47 U.S.C. § 271(c)(1)(A). There is simply no way that the language of Track A allows a pure reseller, or a carrier relying "predominantly" on resale, to qualify as a "competing provider." Thus, in order to rely on the service of any one carrier to residential consumers, SWBT must show that the specific carrier in question is offering the totality of its telephone exchange services predominantly over its "own facilities." See id. In this regard, SWBT's reliance on the Michigan Order's ruling that facilities-based competition to each category (residential and business) could be met by two or more distinct carriers is wholly misplaced. See SWBT Br. at 13. There, the Commission's determination rested on an ambiguous phrasing in Track A as to whether a *single* provider of *both* types of facilities-based service must be found; the meaning of Track A's requirement that a competing provider offer service "predominantly" over "its own facilities" was not reached. See Michigan Order ¶ 83-85; id. ¶ 103.[16] If the Commission were to allow Track A to be met in a state where no predominantly facilities-based carrier served residential customers, and where only resellers addressed that market segment, it would impermissibly render the predominantly or

[16] Indeed, to the extent that the Commission examined the question of whether a BOC could rely upon a carrier using resale as a competing provider under Track A, the Commission concluded that it could not. See Michigan Order ¶ 98 (based on Section 271's legislative history, a "new entrant offering service exclusively through *resale of the BOC's telephone exchange service* does not satisfy section 271(c)(1)(A)") (citing Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996)); see also id. ¶ 98 n.225 (resale, as described in the House Commerce Committee's precursor to Section 271(c)(1)(A), "'would not qualify [as a facilities-based competitor] because resellers would not have their own facilities in the local exchange over which they would provide service.'") (citation omitted).

exclusively facilities-based requirement meaningless surplusage.[17] Here, SWBT has not established that resale customers are being served by a carrier whose total telephone exchange service is predominantly facilities-based.[18] It is SWBT's burden to make that showing; it clearly has not done so.

SWBT's application for Arkansas, then, is no different than a number of other Section 271 applications that have been filed with and rejected by the Commission. The application does not meet the requirements of Track A and is ineligible to proceed under Track B.[19] SWBT plainly has received qualifying requests from companies for interconnection agreements that, when fully implemented, will result in the provision of the kind of service described in Section 271(c)(1)(A). However, none of these agreements alone or in the aggregate has produced facilities-based competitive provisioning for residential customers. Lacking a true commercial alternative for

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17 See Regions Hosp. v. Shalala, 522 U.S. 448, 467 (1998) ("We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' This rule has been repeated innumerable times." (quoting Market Co. v. Hoffman, 101 U.S. 112, 115-16 (1879)); Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) ("In construing a statute, we are obliged to give effect, if possible, to every word Congress used.").

18 None of the carriers described in the Smith Affidavit fits this category. See Smith Aff., Attachment E.

19 See Oklahoma Order ¶¶ 13-22; Application of BellSouth Corp. to Provide In-Region, InterLATA Services in South Carolina, 13 FCC Rcd. 539, ¶ 57 (1997) ("South Carolina Order").

residential consumers,[20] Arkansas markets thus remain in the "ramp-up" period that Congress contemplated in Track A.[21]

III. Because The Arkansas PSC Cannot Ensure SWBT's Future Compliance With Its Section 271 Commitments And The Act, SWBT's Application Is Contrary To The Public Interest.

As the Commission has recognized, satisfaction of the competitive checklist alone is an insufficient basis upon which to conclude that a BOC's Section 271 application is in the public interest.[22] Instead, the Commission must also "review the circumstances presented by the application to ensure that *no other relevant factors exist* that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public interest as Congress expected."[23] Among other considerations, the Commission must "ensure that there are not *unusual circumstances* that would make entry contrary to the public interest under the particular circumstances of this application."[24] The Arkansas Telecommunications Regulatory Reform Act of 1997 ("Arkansas Act"), which significantly limits

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20 SBC Communications, Inc., 138 F.3d at 416 (upholding Commission's interpretation of "competing providers" as requiring an actual commercial alternative to the BOC's local telephone exchange service).

21 Oklahoma Order ¶ 45 (1997) (Congress recognized "that there would be a period during which good-faith negotiations are taking place, interconnection agreements are being reached, and the potential competitors are becoming operational by implementing their agreements").

22 Application by SBC Communications, Inc. to Provide In-region, InterLATA Services in Texas, 15 FCC Rcd 18354, ¶¶ 416-17 (2000) ("Texas Order"); Application by Bell Atlantic New York for Authorization to Provide In-Region, InterLATA Service in the State of New York, 15 FCC Rcd 3953, ¶¶ 422-23 (1999) ("New York Order"), aff'd sub nom., AT&T v. FCC, 220 F.3d 607 (D.C. Cir. 2000); Louisiana II Order ¶ 361; Michigan Order, ¶ 389. In fact, "Congress specifically rejected an amendment that would have stipulated that full implementation of the checklist necessarily satisfies the public interest criterion." Michigan Order ¶ 389 & n.1004.

23 New York Order ¶ 423; Texas Order ¶ 417 (emphasis added).

24 Texas Order ¶ 417 (emphasis added).

the power of the Arkansas PSC to ensure that the local exchange market is open to competition, constitutes precisely such an unusual circumstance.[25] Indeed, this Commission has already preempted certain provisions of the Arkansas Act because they conflicted with federal law.[26] Those steps, while necessary, are not enough. The state law restrictions on the PSC, discussed below, coupled with the lack of actual competition in Arkansas highlighted above, compel a finding that granting the application under the current circumstances is contrary to the public interest.

First, state law restrictions on the Arkansas PSC's ratemaking authority leave the agency unable to implement critical provisions of federal law. As the Arkansas PSC itself has indicated, in establishing UNE rates, it is bound by the Arkansas Act, which requires that, "'The prices for unbundled network elements shall include the actual costs including an allocation of joint and common costs and reasonable profit.'" Second Consultation Report at 11 (citing Ark. Code Ann. § 23-17-409(e) (Supp. 1999)). As a result of this prohibition, the Arkansas PSC cannot set rates for UNEs and interconnection at TELRIC, as dictated by the Commission's pricing rules. See id. The Arkansas PSC has repeatedly raised the issue of its authority during various state arbitration proceedings as well.[27] For example, during the AT&T/SWBT arbitration, the PSC indicated that Section 9 of the Arkansas Act, Ark. Code Ann. § 23-17-409, "effectively proscribes [the PSC's]

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[25] See Ark. Code Ann. § 23-17-401 et seq. (Supp. 1999).

[26] See American Communications Services, Inc., MCI Telecommunications Corp. Petitions for Expedited Declaratory Ruling Preempting Arkansas Telecommunications Regulatory Reform Act of 1997 Pursuant to Sections 251, 252, and 253 of the Communications Act of 1934, as amended, 14 FCC Rcd 21579 (1999).

[27] AT&T Communications of the Southwest, Inc.'s Petition for Arbitration of Unresolved Issues with SWBT Pursuant to Sec. 252(b) of the Telecommunications Act of 1996, Dkt. No. 96-395-U, Order No. 11 (ARPSC Feb. 18, 1998) (App. E - AR, Tab 8) ("Order No. 11").

role and authority in an arbitration of an interconnection agreement." Order No. 11 at 4. Although the Arkansas PSC concluded that it is authorized to "determin[e] whether the ILEC is offering interconnection, resale and unbundling" in compliance with state and federal law, id., it further indicated that it "has no authority to obtain information or investigate any financial information of SWBT, including cost studies to verify the accuracy of SWBT's filing." Id. at 5. Without such investigative authority, it is impossible for this Commission to rely on the Arkansas PSC to set TELRIC-compliant rates. Moreover, even if the Arkansas PSC could investigate SWBT's cost studies, as noted, it is required by state law to set rates based on actual, not forward-looking incremental, costs.

This unusual circumstance in Arkansas is particularly important at a time when the TELRIC standard for pricing is under review by the Supreme Court. As discussed below, a decision leaving any ambiguity in the Iowa Utilities II proceeding opens up the possibility that state commissions may have to revisit UNE and interconnection rates as early as January.[28] This would again return the ratemaking responsibility -- at least theoretically -- to the Arkansas PSC. Such persistent uncertainty regarding pricing for UNEs and interconnection -- bedrock inputs for CLECs -- increases the urgency of addressing the unusual circumstances presented by Arkansas state law prior to granting the application.

Second, the Arkansas Act allows SWBT to increase or decrease its rates for telecommunications services (with certain exceptions not relevant here) without Arkansas PSC approval. See Ark. Code Ann. § 23-17-408(c) (Supp. 1999). Thus, SWBT has the ability to unilaterally raise its rates for services that are required to be regulated under federal law. See Second Consultation Report at 11. Given these limitations, the Commission cannot make the

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[28] See infra at 19-20 & n.36.

requisite finding that rates for telecommunications services comply with federal law. Even if the Commission finds that adopting Kansas rates in Arkansas complies with the requirements of the Act today, the Arkansas PSC apparently has no authority to ensure continued compliance in the future.

Third, the Commission will not be able to rely on the Arkansas PSC to prevent backsliding. In weighing the public interest in granting the application, the Commission should carefully consider "whether [there is] sufficient assurance that markets will remain open after grant of the application." Texas Order ¶ 417. Although the Commission has not required BOC applicants to demonstrate that they are subject to state performance monitoring and post-entry enforcement as a condition of Section 271 approval, "the fact that a BOC will be subject to performance monitoring and enforcement mechanisms would constitute probative evidence that the BOC will continue to meet is section 271 obligations and that its entry would be consistent with the public interest."[29]

In Arkansas, the PSC's hands are tied by state law, preventing it from ensuring such future compliance. In response, SWBT relies heavily on its proposed performance remedy plan to demonstrate that it has satisfied the public interest prong of Section 271. See SWBT Br. at 159. However, as a result of the unusual state law constraints on the Arkansas PSC's authority to enforce such a performance assurance plan, simply adopting a plan that has been found to adequately deter backsliding in other states is not sufficient to guarantee that Arkansas' local market is irreversibly open to competition. Indeed, the Arkansas PSC itself has asked the Commission to address these concerns:

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[29] Texas Order ¶ 420; New York Order ¶ 429.

> Due to [the Arkansas PSC's] limited legal authority to ensure future performance, we would strongly suggest that the FCC consider including potential anti-backsliding provisions in any determination it makes on a prospective SWBT application for permission to provide interLATA telecommunications services in Arkansas.

Second Consultation Report at 12. SWBT questions competitors' concerns about enforcement, arguing instead that it has always made the required payments in other states and "[i]t is therefore exceedingly unlikely that the Arkansas PSC's authority to enforce the remedy plan will ever be invoked to ensure SWBT's adherence to its terms." See SWBT Br. at 160. Far from providing further assurances, the fact that SWBT has been required to pay substantial (albeit commercially insignificant) penalties in other states demonstrates that the Commission *cannot* rely on SWBT's good faith to prevent backsliding.[30] Moreover, those penalties have been paid in states where the state commissions have substantial authority to enforce the market opening requirements of the Act and SWBT's Section 271 commitments.

The fact that this Commission has not required state performance measures and penalties under federal law as a condition of Section 271 approval further undercuts the Arkansas PSC's post-entry enforcement ability, because yet another provision of the Arkansas Act prohibits the Arkansas PSC from imposing any interconnection requirements that go beyond the requirements of the federal Act. See Ark. Code Ann. § 23-17-409(i)(2) (Supp. 1999). Therefore, the Arkansas PSC has no authority to impose performance measures to ensure compliance following approval, absent a federal mandate. Relying on SWBT's proposed performance remedy plan without the threat of state enforcement would be foolhardy. Without state post-entry enforcement of the

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[30] See, e.g., Business Digest: State Fines SBC for Slowness on Transfers, Ft. Worth Star-Tel., Apr. 19, 2000 at 2 (Texas PUC fines SBC for failure to deliver equipment and space to CLECs in a timely manner); SBC Fined Over Internet Access Delay, S.F. Examiner, May 18, 2000 at C5 (SBC fined for failure to timely deliver equipment and collocation space to Covad in California).

performance assurance plan and continued compliance with the market opening provisions of the Act, the miniscule amount of competition that exists in Arkansas today will not survive.

Sprint does not suggest that a Section 271 application could never be granted in Arkansas. Nonetheless, state authorities have chosen to give SWBT substantial freedom from regulation, and that choice must necessarily inform the Commission's judgment here. Moreover, the issues raised regarding SWBT's compliance with Section 271 are hardly isolated from this circumstance of Arkansas law. Is it really surprising that there is no facilities-based competition in Arkansas given the PSC's lack of legal authority to ensure the reasonable availability of UNEs and interconnection? Can anyone doubt that there is a direct causal relationship here? And if SWBT is willing to repeatedly violate and pay penalties for offenses in states with vigilant enabling statutes, can one rationally predict SWBT's compliance in Arkansas where such an offense may not be punishable at all?

While SWBT may claim that it would be unfair to deny its Section 271 application due to circumstances allegedly beyond its control, Section 271 is fundamentally a statute of consumer welfare and economic efficiency, not Bell Company equity. The statute reflects the fundamental judgment by Congress that the BOC should not be allowed to enter the interLATA market until its local markets are open. The issue of fault is immaterial, as the Commission has made clear. For example, the Commission has indicated that its public interest inquiry would necessarily investigate not only a BOC's failure to cooperate but other issues affecting local competition, such as "whether a state has adopted policies and programs that favor the incumbent." Michigan Order ¶ 396. Surely, under circumstances such as those present in Arkansas, SWBT's entry into long distance cannot be in the public interest.

IV. SWBT's Application For Missouri Is Replete With Interim Prices For UNEs And Interconnection That Chill Competitive Entry, In Violation Of Section 271 Of The Act.

Section 271 requires SWBT to provide access to UNEs and interconnection in accordance with the requirements of Sections 251(c)(3) and 252(d)(1). 47 U.S.C. § 271(c)(2)(B)(i), (ii). Sections 251(c)(3) and 252(d)(1) in turn require that SWBT provide interconnection and unbundled access to UNEs at cost-based rates and on terms and conditions that are just, reasonable, and nondiscriminatory. Id. §§ 251(c)(3), 252(d)(1). "The Act vests in the Commission the *exclusive responsibility* for determining . . . whether a BOC has priced unbundled network elements . . . in accordance with the pricing requirements set forth in section 252(d) and, therefore, whether the BOC has fully implemented the competitive checklist."[31] Although SWBT earlier defended its rates as cost-based, it has since further reduced certain recurring rates for loops, signaling, switching and transport. SWBT Br. at 48. In addition, it has reduced the nonrecurring rate for the analog line port by 95%. Id. Despite these last minute concessions, the prices in Missouri cannot reasonably be said to comply with TELRIC. They are not cost-based, and -- in light of the Eighth Circuit's decision -- it is wholly uncertain when TELRIC rates will actually be established for UNEs in Missouri.

Moreover, where they create great uncertainty, as here, Commission precedent indicates that interim rates are unacceptable.[32] Although the Commission has expressed a willingness to allow a small number of rates to be assessed on an interim basis because of the pragmatic recognition that rates will often be in some state of flux, it has generally done so only where it had "confidence that the [state c]ommissions will set permanent rates that are in compliance with the

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[31] Michigan Order ¶ 282 (emphasis added).

[32] See New York Order ¶ 258.

Act and our rules."[33] As Sprint pointed out in its comments on SWBT's first Missouri application, two crucial differences exist for Missouri. First, the extent of interim rates in Missouri is unprecedented. Indeed, virtually *all* of the rates in the M2A are interim and/or subject to great uncertainty, as discussed below. Second, in light of the Eighth Circuit's decision prohibiting the Missouri PSC from setting rates based on TELRIC, the Commission cannot rely on the Missouri PSC's "commitment" to follow TELRIC pricing rules.

A. Despite The Fact That The Missouri PSC Has Conducted No Fewer Than Seven Cost Proceedings, The Majority Of SWBT's UNE Rates Are Interim Or Otherwise Subject To Great Uncertainty.

In order to appreciate the number of UNE rates that are interim or vacated (though stayed), it is necessary to review the various rate proceedings in Missouri. A short description of each proceeding, and its current status, thus follows.

TO-97-40 Rates -- These rates are derived from the AT&T/SWBT arbitration in which the Missouri PSC developed "permanent" rates for UNEs in July 1997. The rates were subsequently incorporated into other CLECs' interconnection agreements and are also the rates in SWBT's M2A.[34] SWBT has since successfully appealed these rates and ultimately obtained an order from the Eighth Circuit declaring them to be unlawful -- along with the entirety of the agreement in which they were included -- because they were based on the Commission's TELRIC pricing rules.[35] Although the issuance of the mandate in this case has been stayed, full resolution is

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33 Kansas/Oklahoma Order ¶ 222.

34 Staff's Summary of Evidence, Comments, and Positions at 13 (MOPSC Dec. 26, 2000) ("Staff Summary") (attached as Exhibit A).

35 Final Arbitration Order, AT&T Communications of the Southwest, Inc.'s Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996, Case No. TO-97-40 (MOPSC July 31, 1997) (App. G - MO, Tab 11), rev'd and remanded sub nom., Southwestern Bell Tel. Co. v. Missouri Pub. Serv. Comm'n, 236 F.3d 922 (8th Cir. 2001) ("Southwestern

months if not years away. A decision by the Supreme Court leaving any ambiguity in the Iowa Utilities II proceeding opens up the possibility that the Eighth Circuit will still require revision by the Missouri PSC of SWBT's UNE and interconnection rates.[36]

TO-98-115 Rates -- These are additional UNE rates that have been interim since December 1997, and have never been made permanent.[37] These rates arose out of the second phase of the AT&T arbitration and are generally miscellaneous UNE rates, *e.g.*, OC3/OC12/OC48 Transport, nonrecurring charges for vertical features and signaling elements, service order charges, cross-connects, etc.[38] The Missouri PSC's proceedings began in September 1997, and, in December 1997 interim rates were set, along with a procedure for establishing permanent rates. After a hearing in 1998, the Missouri PSC issued an order in December 2000 indicating it wanted to move "expeditiously to establish permanent rates."[39]

Bell"), stay granted, No. 99-3833 (8th Cir. Feb. 7, 2001), petition for cert. filed, AT&T Communications of the Southwest v. Missouri Pub. Serv. Comm'n, 69 U.S.L.W. 3730 (U.S. May 8, 2001) (No. 00-1689).

36 In January, the Supreme Court granted petitions for *certiorari* requesting review of the Eighth Circuit's vacatur of the Commission's TELRIC rules. Iowa Utils. Bd. v. FCC, 219 F.3d 744 (8th Cir. 2000), cert. granted sub nom. Verizon Communications v. FCC, 69 U.S.L.W. 3495 (U.S. Jan. 22, 2001) (No. 00-511) ("Iowa Utilities II"); see also Iowa Utils. Bd. v. FCC, No. 96-3321, Order Granting Motion for Partial Stay of the Mandate (8th Cir. Sept. 22, 2000). Oral argument is scheduled for October.

37 Interim Order Regarding the Missouri Interconnection Agreement at 5 (MOPSC Feb. 13, 2001) (App. C - MO, Tab 86) ("Missouri PSC Interim Order").

38 See generally AT&T Communications of the Southwest, Inc.'s Petition for Second Compulsory Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996, Case No. TO-98-115, Report and Order (MOPSC Dec. 23, 1997) (App. G - MO, Tab 20).

39 AT&T Communications of the Southwest, Inc.'s Petition for Second Compulsory Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Southwestern Bell, Case No. TO-98-115, Order Directing Filing at 2 (MOPSC Dec. 12, 2000) <www.psc.state.mo.us/orders/12128115.htm>.

Notwithstanding the passage of more than 3 years, the rates are still not permanent, and Docket 01-438 has been opened to review the rates. These rates were also the subject of SWBT's appeal in Southwestern Bell and thus have been vacated (subject to stay of the issuance of the mandate) by the Eighth Circuit. Indeed, the Missouri PSC has recognized as much, noting two months ago that "the recent court decision [in Southwestern Bell] has created uncertainty as to the future of these prices." Missouri PSC Interim Order at 5.

Other UNEs -- There are 95 UNE rates that neither phase of the AT&T/SWBT arbitration addressed. Id. For these remaining UNEs, the M2A reflects the temporary adoption of the Texas UNE prices on an interim basis subject to true-up. Id. at 6-7. These 95 UNEs will be reviewed in the new PSC Docket 01-438 as well.[40]

Loop Conditioning/Line Sharing. The Missouri PSC has opened up two other dockets, 01-439 (loop conditioning) and 01-440 (line sharing/splitting), to set permanent rates for line conditioning, line sharing, and line splitting. Until permanent rates are determined, SWBT will use the Texas terms and conditions, with rates subject to true-up.[41]

As reflected above, Missouri rates exhibit the use of interim and unstable "fixes" throughout all material terms of entry. No amount of patching, through true-ups or last-minute concessions by the applicant, can serve to satisfactorily dissipate the overhang these temporary rates create for possible new entrants. Indeed, the true-ups themselves are insufficient to guard against future abuse by SWBT. For example, although SWBT was directed to limit the true-up

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40 It is noteworthy that SWBT has chosen to selectively rely on Texas rates except where some ostensible basis for assessing higher interim rates can be found.

41 A seventh pricing docket, 01-298, was established to address collocation rates, terms and conditions. The parties to that case recently filed a unanimous stipulation that, if approved, will result in permanent rates.

period to six months pursuant to the Missouri PSC Interim Order, its schedule of UNE prices does not include such a limitation.[42] Although SWBT included a six month limitation in its line sharing and line splitting appendices, at the same time it unilaterally inserted language that would require payment of any amount due within 30 days after a PSC order adopting permanent rates.[43] Moreover, SWBT is now taking the position that these rates are available only through the M2A – and refuses to even use them as a starting point for other negotiations and/or arbitrations under Sections 251-252.[44]

B. The Rates From TO-97-40 Are, At Best, Interim, And Cannot Be Relied Upon By SWBT As "Permanent" Rates.

The Commission has articulated a three prong test to determine whether it is acceptable to rely on interim rates in a Section 271 application. Specifically, where "an interim solution to a particular rate dispute is [1] reasonable under the circumstances, [2] the state commission has demonstrated its commitment to [the Commission's] pricing rules, and [3] provision is made for refund or true-ups once permanent rates are set," interim rates may be acceptable.[45]

As noted, the rates from Case No. TO-97-40 were subsequently incorporated into other CLEC interconnection agreements and are also the rates SWBT relies upon in its M2A. Staff Summary at 13. SWBT indicated in its earlier application that it will abide by those prices "for

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[42] See AT&T Motion to Reconsider or Clarify Interim Order and Comments Regarding SWBT's M2A Compliance Filing at 6-7 (MOPSC Feb. 23, 2001) (citing M2A UNE Pricing - Schedule of Prices Appendix at 13) (attached as Exhibit B).

[43] See id. at 9 n.5, 13-15 (citing M2A, Attachment 25, § 11.4 and Optional Line Sharing Amendment §§ 1, 10.1).

[44] See, e.g., SWBT's Statement of Position (MOPSC July 30, 2001), filed in Determination of Prices, Terms, and Conditions of Line Splitting and Line Sharing, Case No. TO-2001-440 (attached as Exhibit C).

[45] Texas Order ¶¶ 88, 241; see also Kansas/Oklahoma Order ¶ 238; New York Order ¶ 258.